

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION,
et al.

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION
AGENCY, et al.

Defendants,

v.

AMERICAN CROP PROTECTION
ASSOCIATION, et al.

Intervenor-Defendants.

CASE NO. C01-132C

**WASHINGTON STATE FARM
BUREAU AND WASHINGTON
STATE POTATO COMMISSIONS'
REPLY TO PLAINTIFFS'
COMBINED OPPOSITION TO THE
MOTIONS TO STAY AND MODIFY
THE JANUARY 22, 2004 ORDER OF
INJUNCTIVE RELIEF**

Note on Motion Calendar _____

INTRODUCTION

Plaintiffs' underlying claims and success in this litigation to date are supported almost exclusively by the pro-species presumptions built into the Endangered Species Act ("ESA") and the presumptions the Ninth Circuit has built into the test for issuing a preliminary injunction under the ESA. Plaintiffs' consistently retreat back to these presumptions each time any opposing party attempts to expose the data and methodology underlying Plaintiffs' claims to critical scrutiny. In fact, Plaintiffs' strongest position requires the Coalition to retreat back to

1 these presumptions precisely because the two types of evidence Plaintiffs presented to this Court
2 to support its arguments of harm simply do not demonstrate that pesticides are entering
3 waterways in quantities which would harm salmon. In fact, the U.S. Geological Survey
4 (“USGS”) evidence Plaintiffs submitted in support of its claims, in actuality, demonstrates that
5 the concentration of pesticides found in the samples are well below the Environmental Protection
6 Agency’s (“EPA’s”) risk threshold. In the end, because Plaintiffs cannot demonstrate that
7 current agricultural practices are actually harming salmon, all Plaintiffs can do is to hang its hat
8 on the EPA’s section 7 procedural violation and let the consequences flow from the pro-species
9 presumptions built into the ESA and the standard for preliminary injunction.

10 Likewise, Plaintiffs retreat back to these legal presumptions to avoid discussing any of the
11 impacts this Order will have on Washington State farmers. As Washington State farmers began
12 to plan for this year’s growing season by deciding which crops to grow, which fields to use, and
13 which pesticides to buy, news of this Order has trickled down to the individual growers by
14 notification in the WSFB’s newsletter, word-of-mouth, and point of sale notifications. Many of
15 these farmers were wholly unaware of this lawsuit or the impacts the Order would have on their
16 livelihoods prior to the recent notification. Nonetheless, Washington State farmers are charged
17 with the onus of understanding the Order, understanding the impacts this Order will have on their
18 operations and livelihoods, and understanding the alternatives, if any, to their current pesticide
19 regime. Because these additional burdens have been summarily imposed on individual
20 Washington State farmers with no prior warning, the Washington State Farm Bureau and the
21 Washington State Potato Commission (hereinafter referred to collectively as “WSFB”) assert that
22 Plaintiffs and this Court can do no less than acknowledge and understand the economic hardships
23 this Order will impose on countless individual family farming operations.

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This expansive Order is fundamentally different from other preliminary injunctions issued by courts in the Ninth Circuit because it places the onus on third parties with absolutely no prior connection to the EPA defendants to fulfill its mandates. Plaintiffs claim this Order is no different, for example, from the effects of an injunction invalidating an EPA water discharge permit, in that both effect third parties to the litigation. Dkt. No. 287, Pl. Op. p. 44. However, in Plaintiffs' comparison scenario, the third party affected by the injunction was required to obtain a discharge permit from the EPA. As with any discretionary permit issued by a governmental agency, the permittee must reasonably expect that the terms of the permit may change. The permit also serves to link the third party ultimately bound by the Order with the agency responsible for issuing the permit.¹

WSFB and WSPC Reply to Pl.
Combined Opposition to Motions
to Stay and Modify January 22,
2004 Order of Injunctive Relief

1 In Zepeda v. United States Immigration and Naturalization Service, the Ninth Circuit
2 struck down the district court's injunctive order as overly-broad, for impermissibly attempting to
3 bind third parties to the lawsuit. 753 F.2d 719 (9th Cir. 1985). The court stated, "[a] federal court
4 may issue an injunction if it has personal jurisdiction over the parties and subject matter
5 jurisdiction over the claim; it may not attempt to determine the rights of persons not before the
6 court. . . . The district court must, therefore, tailor the injunction to affect only those persons over
7 which it has power." Id. at 727. The Ninth Circuit cited the general rule that a preliminary
8 injunction can only be employed for the limited purpose of maintaining the status quo, rejecting
9 the dissent's analysis because "[r]ather than retain the status quo solely of the parties before us,
10 the dissent would instead have us reach out to change the state of the world for parties not before
11 us." Id. at 728-29, n. 1. This Order is overly-broad for exactly the same reason, because it
12 purports to change the status quo and reasonable expectations of individual landowners not a
13 party to this action and over whom the district court has no personal jurisdiction.

14 In contrast to Plaintiffs' comparison scenario, Washington State farmers bound by this
15 Order have no such connection, not even a tenuous one, with the EPA. Rule 65(d) clearly states
16 that an Order may bind only parties and those acting with actual knowledge of the Order who act
17 in concert with parties to the lawsuit. Fed. R. Civ. P. 65(d). In this instance, the EPA does not
18 issue permits for pesticide use, does not enter into contracts or leases with end users, does not
19 represent the interests of the end users, does not enter into cooperative agreements with end users
20 regarding the use of pesticides, and does not exert any regulatory control over end users. In
21 short, Washington State farmers are not "acting in privity or concert" with the EPA and therefore
22 cannot be bound by this injunction under the plain language of Rule 65(d). Curiously, Plaintiffs

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24 all groundfish trawl fishing within Steller sea lion critical habitat; National Marine Fisheries Service
25 ("NMFS") regulates catch limits and quotas among the commercial fisheries.).

1 respond to this concern by claiming the language of Rule 65(d), restricting the injunction to
2 “those persons acting in active concert or participation” provides the safeguards sought by
3 WSFB. Dkt. No. 287, Pl. Op. p. 44-45. However, Plaintiffs fail to allege how WSFB members
4 act “in concert or participation” with the EPA’s pesticide registration process. On its face,
5 Plaintiffs response seems to validate WSFB’s assertion that end users cannot be bound by this
6 Order under Rule 65(d).

7 Another principal concern of WSFB is that the Order is (1) simply too confusing for the
8 average WSFB member to understand, (2) requires access to a computer with sufficient memory,
9 software upgrades, and modem speed to download the graphics-intensive websites, and (3)
10 requires a better than average understanding of computer technology to navigate around websites
11 that employ GIS technology and involve overlapping layers of technical data. On paper, the
12 prohibitions are clear: each landowner whose property adjoins “salmon bearing streams” must
13 refrain from applying those pesticides listed in Section I of the Order within the designated buffer
14 zones, as measured from the “ordinary high water mark.” However, as with most generalized
15 statements, the devil is in the details, and in this instance, it is the application of this seemingly
16 straightforward prohibition to actual conditions that creates the problem for Washington State
17 farmers.

18 This is no simple prohibition on the use of “X” pesticide, as in the case Defenders of
19 Wildlife v. EPA, which sought the prohibition of the above-ground use of strychnine. 882 F.3d
20 1294 (8th Cir. 1989). Washington State farmers must wade through several pages of charts,
21 exceptions, and modifications, as well as being expected to keep abreast of any subsequent EPA
22 effects determinations,² before even figuring out which pesticides are subject to the Order. But in
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24 ² Note that since this Order has been entered, the EPA has released a “no effect”
25 determination for Acephate and a “not likely to adversely affect” (“NLAA”) determination for
26 Linuron and Mehamidophos. (Summaries attached hereto as Exhibits 1-3; the full document can be

1 order to even determine which pesticides are prohibited, the landowner must first understand the
2 legal and biological concepts of critical habitat and evolutionarily significant units (“ESU”), as
3 well understanding how these concepts relate to one another, to identify the geographic scope of
4 the Order. Finally, the landowner must then apply the buffer zone from the “ordinary high water
5 mark,” despite the Order’s failure to define or supplement this term in order to assist landowners
6 applying this concept to their property.

7 Compliance with the Order also raises a host of technical problems. The Order requires
8 that each landowner have access to a computer with sufficient memory, modem speed, and
9 software to download large files of graphics contained on the National Marine Fisheries Service
10 (“NMFS”) and StreamNet databases. The reality, however, is that relatively few households
11 have this capability. A 2001 survey of internet usage conducted by the U.S. Census Bureau
12 found that only 60.4% of Washington State households have internet access. See
13 <http://www.esa.doc.gov/anationchart.cfm>.³ (Data charts attached hereto as Exhibit 4).
14 Nationwide, only 48.7% of households in rural areas have internet access. Id. In the western
15 region of the United States, 77.8% of households still utilize dial-up connections. Id. This
16 Order, therefore, requires internet access and ideally requires a high-speed connection to
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19 found at: <http://www.epa.gov/oppfead1/endanger/effects/>). Although the Order specifically
20 contemplates that parties can request that the injunction be modified to exclude these pesticides, note
21 the practical effect. Until a party requests the Order be modified on this basis, and assuming that this
22 modification will require another mass mailing by Defendant-Intervenors to notify their respective
23 members, the general public remains under the assumption that these pesticides are subject to the
24 Order during the interim time period. Therefore, WSFB requests that these three pesticides be
25 removed from the scope of any injunctive order subsequently issued by this Court.

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27 ³ In February, 2002, the U.S. Department of Commerce published a report titled A
28 Nation Online: How Americans Are Expanding Their Use of the Internet based on the 2001 Census
figures. This report summarizes the specific information contained in the Census data and can be
accessed by following the links found at: <http://www.esa.doc.gov/nationonline.cfm>.

1 download the extensive graphics, requirements for which a majority of rural households do not
2 presently have.

3 Furthermore, household computers must be armed with the latest software, have
4 substantial memory available, and have a fast processor speed in order to accommodate the large
5 graphics files contemplated by the Order. Although the salmonscape website referred to by the
6 Plaintiffs⁴ does not provide any specific guidance as to minimum computer specifications, two
7 different indicators help to establish a range of the minimum specifications necessary to properly
8 and functionally utilize the website.

9 First, the salmonscape website contains an explicit warning and browser requirements.
10 These warnings immediately set off a red flag that not all computers will be able to handle and
11 process the full functionality of salmonscape. The Warning (in red ink) states that the
12 applications is “graphics intensive” and then warns of the possible problems associated with a
13 dial-up modem’s user’s access to the site.⁵ As previously stated, the majority of household
14 computers utilize dial-up connections. With graphics intensive programs such as salmonscape
15 and StreamNet, the use of dial-up connections increases the risk that the session will “time-out,”
16 or that other factors that clutter the connection such as call waiting or phone line splitters will
17 interfere with the connection. The Browser Requirements also show that additional software is
18 needed to run these program. The required software also includes Internet Explorer version 5.5,
19 java, and an archival extraction utility.⁶ While this software is readily accessible and reasonably
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21 ⁴ See Dkt. No. 287, Pl. Op. p. 47; the salmonscape website was developed by the
22 Washington State Department of Fish and Wildlife and can be accessed at:
23 <http://wdfw.wa.gov/mapping/salmonscape/>.

24 ⁵ See fn. 4. The Warnings and Browser requirements are found on the home page of
25 the website.

26 ⁶ Archival extraction utility software decompresses data files compressed for ease of

1 priced, the fact that this software must be purchased and that the user must then learn how to use
2 this software creates yet another barrier to effectively implementing the terms of this Order.

3 The second guidance indicator as to the minimum technical requirements is found in the
4 federal standards. The federal government recognizes minimum technical requirements for the
5 public who uses it's computers in public libraries for cartographic data use, such as the graphic
6 intensive data found on salmonscape. The current minimum standards are attached hereto as
7 Exhibit 6. These minimum standards include: a 1.5 gigahertz ("GHz") processor speed, 512
8 megabytes ("MB") of double data rate memory ("DDRDRAM"), and at least 60 gigabytes ("GB")
9 of hard drive space. Id. These requirements are generally present only in relatively new
10 computers. The cite also recommends that the internet connection be either a Local Area
11 Network with TCP/IP or a Broadband connection such as Digital Subscriber Line ("DSL") or
12 Cable. Id. Of the number of rural households that have access to the internet, only a relatively
13 small number of household computers will likely have sufficient memory, processor speed, and
14 hard drive space available to adequately run these graphic-intensive programs.

15 Apart from the access issues, the Order also presupposes that each landowner is
16 reasonably proficient with navigating windows and GIS databases. Regardless of which website
17 is used, either the database created by the Washington Department of Fish and Wildlife⁷ or the
18 database created by StreamNet,⁸ a landowner can neither quickly nor easily retrieve the desired
19 information. Logging onto either of these two databases, the procedure to receive the desired
20 information is not readily apparent, and the user must first learn how to navigate through the
21 website. Moreover, as the computer skill-level of each individual can vary along a wide

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23 transmission. Examples of this software include WinZip® or Winrar®.

24 ⁷ Found at: <http://www.wdfw.wa.gov/mapping/salmonscape/>.

25 ⁸ Found at: <http://www.streamnet.org/>.

spectrum, it is impossible to generalize that the average landowner will be able to successfully navigate through the various websites as this Order assumes.⁹

Plaintiffs contend that the requirements this Order imposes on third parties to the litigation are no more burdensome than calling a 1-800 number and asking what areas are closed to fishing. Dkt. No. 287, Pl. Opp. p. 48, citing United States v. Olander, 584 F.2d 876, 880-81 (9th Cir. 1978). If the process were only that simple, WSFB would withdraw many of its objections to this Order. But as previously stated, the process is significantly more complex than that required in Olander, requiring access to, and a reasonable understanding of, computer technology. There is also no clear and simple answer waiting on the other end as in Olander, instead requiring users to wade through several layers of data, as well as understanding complex legal and biological concepts, before finally arriving at the sought-after answer.

Furthermore, if the end user violates this Order, the end user may be subject to the range of court's contempt powers as well as subject to penalties under section 9 of the ESA. Because the end users had absolutely no connection to this lawsuit, this also raises a fundamental question whether the Order is constitutionally void for vagueness. The vagueness doctrine is based on due process principles that require fair notice and warning. Smith v. Goguen, 415 U.S. 566, 572-73 (1974). Washington State farmers only received official notice that this lawsuit affects the use and enjoyment of their private property via the WSFB's April, 2004 newsletter, when WSFB notified their members of the terms of the January 22, 2004 Order. Despite the notice being released in accordance with the Court's timetable, most Washington State farmers only received such notice during the past few weeks, and have been burdened with understanding this Order at

⁹ Plaintiffs note that the WSFB does not object to the database applicable to California or Oregon. Although it would appear to be self-evident, WSFB does not object to these databases because the organization only represents the interests of Washington State farmers in this Motion for Reconsideration.

1 approximately the same time critical decisions must be implemented regarding spring planting.
2 Because these farmers are now subject to both the Court's contempt powers and prosecution
3 under section 9 of the ESA, with little to no prior notice or warning, there is a substantial
4 question whether this Order is constitutionally void for vagueness.

5 The ultimate question remains whether the January 22, 2004 Order, with all of its
6 associated impacts and tradeoffs, effectuates the purposes behind the ESA. Biodiversity Legal
7 Foundation v. Badgley, 284 F.3d 1046 (9th Cir. 2002); see also Center for Biological Diversity v.
8 Abraham, 218 F.Supp.2d 1143, 1160 (N.D. Calif. 2002). Because the Plaintiffs have largely
9 rested on legal presumptions to state its case, and because there has been no recognition of the
10 Defendants' counterclaims of harm, it is not surprising that the associated impacts and tradeoffs
11 resulting from this Order were never considered. It is surprising, however, that given the
12 Plaintiffs' commitment to ensuring the survival of the salmonid species, Plaintiffs have
13 completely failed to address WSFB member concerns that this Order will impact their ability to
14 continue investing in salmon habitat improvement projects and in more efficient water delivery
15 systems. WSFB members are not solely alleging counterclaims of individual economic harm;
16 WSFB members have raised legitimate issues regarding the impacts this Order will have on their
17 ability to contribute to the long-term survival of the salmonid species. At the very least, these
18 counterclaims of harm to salmonid species should be addressed before crafting the nature and
19 scope of injunctive relief ultimately designed to further the survival of the salmonid species.

20 LEGAL PRESUMPTIONS

21 Once this Court recognizes that the January 22, 2004 Order cannot stand in its current
22 form as a violation of Rule 65(d), this opens the door to a host of alternatives that can be
23 explored, with all parties combining their concerns and relevant expertise in a common forum to
24 craft a narrowly-tailored remedy designed to address Plaintiffs' concerns with sensitivity to the
25 needs of the agricultural community. WSFB recognizes that harm is presumed to flow from the

1 procedural violation under current Ninth Circuit precedent when analyzing a request for a
2 preliminary injunction under the ESA. Thomas v. Peterson, 753 F.2d 754,764 (9th Cir. 1985).¹⁰
3 Accordingly, WSFB takes no issue with the requirement that the EPA conduct risk assessments
4 to remedy the ESA procedural violation. See Dkt. No. 73, July 2, 2002 Order. This is a
5 measured and proportional response to the section 7 procedural violation.

6 Plaintiffs assert that WSFB is attempting to graft a “jeopardy” finding requirement into
7 the current analysis under section 7 of the ESA. Dkt. No. 287, Pl. Op. p. 11. WSFB is not
8 attempting to overturn this circuit’s precedent, rather, WSFB is solely raising the issues regarding
9 the adequacy of the Plaintiffs’ evidence to illustrate that the nature and scope of the injunction
10 was crafted by this Court despite any evidence of harm that has been subjected to expert critique.
11 While the procedural violation may presume harm and support the issuance of an injunction,
12 WSFB asserts that the speculative nature of the asserted harm to the salmonid species is a proper
13 consideration when crafting the scope of the injunction, particularly when the injunction has the
14 potential to substantially impact the private property rights of third parties who are unrelated to
15 the lawsuit.

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17 ¹⁰ Note that Plaintiffs try and distinguish Bays’ Legal Fund v. Browner, 828 F.Supp. 102
18 (D. Mass. 1993), by claiming the EPA had twice found no listed species would suffer any adverse
19 effects from the sewage discharge tunnel. See Dkt No. 287, Pl. Op. p. 17. Plaintiffs claim, in
20 contrast, that this Court specifically held that “significant, potentially harmful activity is presently
21 ongoing . . .” Aug. 16, 2003 Order at 16. However, the evidence offered by Plaintiffs to
22 demonstrate harm has largely been accepted at face value, with little scrutiny given to the
23 methodology behind the assessments or the inferences to be drawn from the data. WSFB has
24 attempted to draw this Court’s attention to the flaws in Plaintiffs’ reasoning, by including the
25 declaration of Dr. Allan Felsot, an expert in the field of environmental toxicology and who has
26 offered a critique of the methodology behind the data that supports Plaintiffs’ allegations of harm.
27 If this Court considers the arguments and conclusions drawn from Dr. Felsot’s critique, this case
28 becomes much more like Bays’ Legal Fund, in that each case concerns the speculative concerns of
the Plaintiffs in the face of otherwise largely inconclusive scientific evidence. At a minimum, the
strength, or the lack thereof, of Plaintiffs claims of harm is an appropriate consideration for
determining the proper scope of the injunction.

1 Though an injunction must generally flow from a substantial procedural violation of the
2 ESA, nothing in the language of the ESA automatically constrains the Court’s traditional equity
3 powers in crafting the nature and scope of the relief, other than the general rule that the final
4 Order must further the goals of the underlying Act. In fact, the only constraint that both
5 expressly and directly impacts judicial discretion in crafting the scope of injunctive relief is Rule
6 65(d). Whether Plaintiffs are presenting the EPA and USGS evidence to demonstrate
7 “jeopardy,” “harm,” “threat,” or whatever legal or biological term is selected, such evidence is a
8 proper consideration when formulating the nature and scope of injunctive relief which is
9 ultimately designed to be “narrowly tailored to remedy the specific harms shown by plaintiffs . .
10 ..” Zepeda, 753 F.2d 719, 728 n. 1.

11 In summary, while the pro-species presumptions in the ESA require that an injunction be
12 the normal and appropriate remedy, that injunction must ultimately be narrowly drawn and
13 designed to effectuate the purposes of the ESA. The injunction issued by this Court on July 2,
14 2002, requiring the EPA to conduct risk assessments in accordance with the Court approved
15 time-table, is the type of narrowly drawn Order designed to further the purposes of the ESA.
16 However, WSFB asserts that this Court’s January 22, 2004 Order fails to fulfill either goal. By
17 completely disregarding counterclaims of economic harm, the scope of the Order has been
18 crafted in an overly-broad manner, and restricts the private property rights of third parties to this
19 litigation. By crafting an order that economically impacts the ability of the agricultural
20 community to continue investing in salmon-habitat improvement projects, this Order also does
21 not further the ultimate goal of protecting the salmonid species.

22 Finally, WSFB is not asking this Court to supplant the role of the agencies in deciding
23 whether current pesticide use is “jeopardizing” salmon as a legal term of art. Rather, WSFB is
24 only asking that this Court make its own conclusions regarding the weight to be afforded to
25 Plaintiffs’ evidence of harm, the contributions of the agricultural community to salmon habitat

1 improvement, and the economic effect this Order will have on third parties to the lawsuit when
2 crafting the precise nature and scope of injunctive relief.

3 EPA'S RISK ASSESSMENT METHODOLOGY AND PLAINTIFFS' EVIDENCE OF HARM

4 As countervailing considerations of economic harm and the future ability to enhance
5 salmonid habitat are appropriate consideration in crafting the precise nature and scope of
6 injunctive relief in order to comply with Rule 65(d), select comments are appropriate to reply to a
7 few of Plaintiffs' specific remarks made in its Response to the Motion for Reconsideration.

8 First, Plaintiffs specifically take issue with the content of the declarations submitted by
9 various WSFB members. For instance, Plaintiffs point to inconsistencies in the varying
10 declarations regarding the availability of phosmet as an alternative to azinphos-methyl, in an
11 apparent attempt to discredit the declarants. Dkt. No.287, Pl. Op. p. 38. There are, however, no
12 inconsistencies between the declarations, and Plaintiffs' assumption that there is always an
13 alternative available, highlights the simplistic rationale that ignores the many site-specific
14 variables. Washington State University publishes an annual report entitled Crop Protection
15 Guide for Tree Fruits in Washington. (Relevant excerpts of this report are attached hereto as
16 Exhibit 5.) In comparing the use of phosmet and azinphos-methyl, there are substantial
17 differences in when these pesticides can be applied, and how relatively effective each pesticide is
18 in controlling specific insect pests. This guide illustrates the fallacy of Plaintiffs' belief that any
19 general statements can be made regarding the substitutability of these pesticides, and the attempts
20 to discredit the declarants should be rejected.

21 Plaintiffs also attempt to discredit the declarants, by pointing out specific instances where
22 declarants stated a certain pesticide is used for their particular needs, yet that pesticide has been
23 assigned a "no effect" or NLAA determination in the particular salmon ESU that encompasses
24 the declarants' property. Dkt. No. 287, Pl. Op. p. 35-36. First, regarding the declarations
25 submitted by WSFB, the declarants were asked only to state which pesticides they routinely use,

1 and were not asked to determine whether those pesticides were subject to the Order in their
2 particular area. Second, those declarants who attempted to make these determinations on their
3 own by accessing the websites were left confused and frustrated, as evidenced by the Knutzen
4 and Nelson declarations. See Dkt. No. 252, Knutzen Decl. ¶ 15, Nelson Decl. ¶ 16. These
5 attempts to discredit WSFB declarants should therefore not influence this Court in any manner.

6 Plaintiffs also note the increasing use of pheromone mating disrupters in the Northwest,
7 apparently in an attempt to bolster its argument that foregoing the use of pesticides will cause no
8 significant adverse effects. Dkt. No. 287, Pl. Op. p. 37-38. The Washington State University
9 began an ongoing study in 1995 to implement various non-chemical alternatives to controlling
10 the spread of the codling moth.¹¹ The 2003 annual assessment monitored various orchards
11 covering a total of 500 acres in Washington State, tailoring the pesticide management regime for
12 each orchard.¹² The results demonstrate that the use of non-chemical mating disrupters are being
13 used on an increasingly wide-spread basis.

14 However, as shown in WSFB's Motion for Reconsideration attached as Exhibit 8, the
15 success of these non-chemical alternatives varies depending on a multitude of factors. Plaintiffs
16 would have this Court restrict all use of pesticides within the buffer zones, despite the fact that
17 the Order economically harms the very individuals who are voluntarily reducing their pesticide
18 use and increasing utilization of non-chemical alternatives. These farmers actively work with the
19 University, and the University's stated program goal is to reduce the need for pesticides to

22 ¹¹ The project is known as the Codling Moth Areawide Management Project, and
23 information on this program can be found at: <http://entomology.tfrec.wsu.edu/stableipm>.

24 ¹² The 2003 Report is entitled Building a Pheromone-Based Multi-Tactic Pest
25 Management System for Western Orchards, and can be found at: [http://www.entomology.tfrec.](http://www.entomology.tfrec.wsu.edu/stableipm/current.html)
26 [wsu.edu/stableipm/current.html](http://www.entomology.tfrec.wsu.edu/stableipm/current.html).

1 control insects in orchard crops, and is designed on a site-specific basis.¹³ The programs
2 currently in place have been very successful to date. Because Plaintiffs’ assumptions regarding
3 the efficacy of pheromone mating disrupters are over-simplistic, and because effective programs
4 already exist to reduce pesticide use, this Court should not further supplant the efficacy of these
5 site-specific programs by entertaining Plaintiffs’ belief that non-chemical alternatives are always
6 available or effective.

7 Finally, Plaintiffs evidence of harm necessarily involves an inquiry into the methodology
8 behind the data and the appropriate inferences to be drawn from such data. Again, if Plaintiffs’
9 evidence of harm is unconvincing, this is an appropriate consideration in limiting the nature and
10 scope of the injunctive relief.

11 Plaintiffs state that the “USGS monitoring, although only a snapshot in time, represents
12 the best monitoring data available.” Dkt. No. 287, Pl. Op., p. 42, n. 17. However, in contrast to
13 Plaintiffs’ assertions, the USGS data indicates that even the “most dangerous” pesticides such as
14 azinphos-methyl and chlorpyrifos are not entering the waterways in concentrations that will harm
15 salmon. Again, EPA selects a concentration of pesticides in water that causes no observable
16 adverse effect (termed NOAEC) on development or reproduction.¹⁴ Dkt. No. 252, Felsot Decl. ¶
17 16. The USGS data offered by Plaintiffs as evidence of harm shows that levels of azinphos-
18 methyl are 4-5 times lower than the NOAEC and levels of chlorpyrifos are 60 times lower than
19 the NOAEC. *Id.* ¶ 29-30. Without even considering that this data is ten years old, or
20 considering the various changes to agricultural practices and subsequent pesticide restrictions
21 that have occurred during the last ten years, the evidence offered by Plaintiffs simply does not
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23 ¹³ See fn. 11.

24 ¹⁴ Note that this addresses Plaintiffs concerns that the EPA has not adequately addressed
25 the sub-lethal effects of pesticide use on salmonid species. The EPA set the risk threshold low
26 enough to detect impacts to both the species development and reproduction.

1 demonstrate that current agricultural practices are harming salmonid species, either through acute
2 toxicity or through sublethal effects.

3 Similarly, Dr. Felsot has critically assessed the presumptions built into the EPA risk
4 assessment model and the application of the model to actual conditions in the Pacific Northwest.
5 WSFB will not restate the arguments made in its Motion for Reconsideration at this time, other
6 than to reiterate that if this Court finds such arguments convincing, such arguments can be used
7 to craft a more narrowly-tailored injunctive order.

8 CONCLUSION

9 The current Order cannot stand, because it violates several provisions of Rule 65(d).
10 When crafting the nature and scope of a new injunctive Order, this Court can consider (1) the
11 strength of Plaintiffs' evidence of harm, (2) WSFB members' contributions to salmon-habitat
12 improvement projects, and (3) countervailing claims of economic harm. These considerations
13 are appropriate in order to craft a narrowly tailored injunctive Order that both (1) complies with
14 the requirements of Rule 65(d) and (2) furthers the underlying goals of the ESA. WSFB believes
15 that the July 2, 2004 Order requiring the EPA to conduct effect determinations is such an
16 appropriate and measured response, as it both complies with Rule 65(d) and furthers the
17 underlying goals of the ESA. However, if this Court wishes to craft a new injunctive Order to
18 further the underlying goals of the ESA, WSFB strongly urges this Court to conduct further
19 proceedings to address the issues presented in these motions prior to issuing its new Order. This
20 can be accomplished by holding a limited evidentiary hearing, submitting the technical issues to
21 a special master, or attempting to resolve several issues through an alternative dispute resolution
22 process. WSFB believes that further salmon habitat enhancement measures can be adopted in a
23 manner that is both less confusing for individual landowners to understand and implement, as
24 well as reducing the overall economic impacts to the agricultural community. However, as with
25 any complex issue, there are no simple or uniform solutions. Accordingly, WSFB urges this

1 Court to take this opportunity to further guide the parties in crafting a more precise injunctive
2 Order that better suits the both the interim concerns of the agricultural community and the long-
3 term survival goals of the salmonid species.

4 RESPECTFULLY SUBMITTED this 3rd day of May, 2004.

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